

Entered on Docket

May 06, 2014

EDWARD J. EMMONS, CLERK

U.S. BANKRUPTCY COURT

NORTHERN DISTRICT OF CALIFORNIA

Signed and Filed: May 6, 2014



*Dennis Montali*

DENNIS MONTALI  
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT

NORTHERN DISTRICT OF CALIFORNIA

In re ) Bankruptcy Case  
10 ) No. 13-30195DM  
11 )  
11 )  
11 ) Debtor. ) Chapter 11  
12 )  
13 )

14 MEMORANDUM DECISION ON FEE APPLICATIONS OF TRUSTEE  
15 AND HIS PROFESSIONALS

16 On December 13, 2013, this court held a hearing on (1) the  
17 First and Final Application for Compensation and Reimbursement of  
18 Expenses by James S. Lowe II, the chapter 11 trustee ("Trustee");  
19 (2) the First and Final Application for Fees and Expenses of  
20 Gabrielson & Company ("Gabrielson"), accountant for Trustee; and  
21 (3) the First and Final Application for Compensation for Services  
22 and Reimbursement of Expenses of Joseph & Cohen, P.C. ("J&C"),  
23 counsel for the Trustee (collectively, the "Applicants"). The  
24 United States Trustee ("UST") opposed the Trustee's application,  
25 contending that he had improperly calculated his maximum  
26 compensation on funds disbursed to debtor Laboratory Skin Care,

1 Inc. ("Debtor").<sup>1</sup> Like the UST, Debtor opposed the Trustee's  
2 application because his fees purportedly exceeded the cap of 11  
3 U.S.C. § 326. Debtor additionally opposed the fee applications of  
4 Gabrielson and J&C, arguing that the services rendered were not  
5 necessary to the administration of the estate or were not  
6 beneficial to estate.

7 At the hearing, the court approved a portion of the fees and  
8 costs requested by the Applicants<sup>2</sup> and permitted the Applicants,  
9 the UST and Debtor to submit supplemental briefing regarding  
10 Applicants' entitlement to the balance of their requested fees.  
11 The parties stipulated to several extensions of time for filing  
12 the supplemental briefing, and the matter was submitted on March  
13 10, 2014, upon submission of the final briefing by the Applicants.  
14 For the reasons set forth below, the court will permit the Trustee  
15 to recover \$44,262.67 as his total compensation and will allow in  
16 part the balance of the fees requested by J&C and Gabrielson.<sup>3</sup>

17 \_\_\_\_\_  
18 <sup>1</sup> The UST also opposed any request for fees above the  
statutory cap for services rendered by Trustee's paraprofessional  
19 who was not employed as an estate professional under section  
327(a). See Boldt v. U.S Trustee (In re Jenkins), 130 F.3d 1335,  
20 1341 (9th Cir. 1997). The court sustains this objection, and  
will not allow any such fees beyond the cap.

21 <sup>2</sup> The court awarded Trustee \$23,009.03 in fees and \$2,626.05  
in expenses (Docket No. 312); awarded J&C \$79,518 in fees (Docket  
22 No. 313); and awarded Gabrielson \$56,565 in fees and \$668.87 in  
expenses (Docket No. 311).

24 <sup>3</sup> On March 10, 2014, J&C and Gabrielson filed supplemental  
25 fee applications (Docket Nos. 367 and 369) requesting additional  
fees primarily pertaining to the defense of their fees and the  
26 Trustee's requested compensation. The court is not addressing  
these supplemental applications in this memorandum decision as  
27 Debtor, UST and creditors have not been provided an opportunity to  
respond. If J&C and Gabrielson desire court consideration of  
28 their supplemental requests, they should provide Debtor and the  
UST with an opportunity to be heard. An actual hearing is not

1     A.    Trustee's Fees

2           Trustee contends that when calculating his maximum statutory  
3 fee, the court should permit him to recover a percentage of the  
4 funds over which the reorganized Debtor seized possession and  
5 control upon confirmation. In particular, Trustee persuasively  
6 asserts that Debtor, Debtor's counsel (Richard A. Lapping, Esq.),  
7 and Debtor's CEO and plan proponent (Ms. Zahra Mansouri) agreed  
8 that Trustee would pay the administrative expenses that were  
9 incurred or allowed during his tenure (i.e., those of Dumas &  
10 Clark, Arch & Beam, Gabrielson, the UST, etc.) from the Trustee's  
11 account at Bank of America or from a new, special reserve account  
12 maintained by the Trustee solely for that purpose. While the  
13 confirmed plan provided that the reorganized Debtor "shall" pay  
14 professional fee claims and trustee compensation, the parties'  
15 course of dealing throughout the plan proposal and confirmation  
16 process reflects that Trustee would make those disbursements  
17 before relinquishing full control of the account to Debtor.<sup>4</sup>

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19 necessary at this juncture; scream-or-die notice under B.L.R.  
20 9014-1(b) will suffice.

21           <sup>4</sup> Both Mr. Lapping and Ms. Mansouri deny that they entered  
22 into any agreement that would be contrary to sections 3.1.1 and  
23 3.4 of the confirmed plan. That may be so. The court notes,  
24 however, that the "LSC - Funds Administration" e-mail circulated  
25 by Trustee's counsel following the confirmation hearing reflects  
26 that a supplemental order or other submission would reflect the  
27 procedures. Thus, the parties contemplated making conforming  
28 modifications to the plan (whether by order or otherwise). See  
Exhibit B to the Declaration of David A. Honig, Esq., filed on  
December 12, 2013, at Docket 306-2. The court routinely signs  
orders modifying a plan provision as stipulated by parties,  
particularly when, as here, the amendment would not affect  
payments to other creditors. Such an amendment would be solely  
administrative in nature. No creditor's payment would have been  
decreased or affected by having the trustee pay the administrative  
claims.

1       The UST and the Debtor correctly observe that the language of  
2 section 326(a) explicitly excludes funds disbursed or turned over  
3 to a debtor from the calculation of a trustee's maximum statutory  
4 compensation:

5       In a case under chapter 7 or 11, the court may allow  
6 reasonable compensation under section 330 of this title  
7 of the trustee for the trustee's services, payable after  
8 the trustee renders such services, not to exceed 25  
9 percent on the first \$5,000 or less, 10 percent on any  
10 amount in excess of \$5,000 but not in excess of \$50,000,  
11 5 percent on any amount in excess of \$50,000 but not in  
12 excess of \$1,000,000, and reasonable compensation not to  
13 exceed 3 percent of such moneys in excess of \$1,000,000,  
14 upon all moneys disbursed or turned over in the case by  
15 the trustee to parties in interest, excluding the  
16 debtor, but including holders of secured claims.

17       11 U.S.C. § 326(a) (emphasis added). Here, however, certain funds  
18 upon which the Trustee calculates his maximum compensation were  
19 not voluntarily disbursed or turned over by him to the Debtor.  
20 Rather, Ms. Mansouri unilaterally usurped control over funds in  
21 the Trustee's account in derogation of an understanding between  
22 the parties about the disbursements of funds and in defiance of  
23 instructions by her counsel. Trustee and his counsel have  
24 presented compelling evidence that in the course of proposing and  
25 seeking confirmation of Debtor's plan of reorganization, Ms.  
26 Mansouri and Debtor had acted consistently with the thought that  
27 the Trustee's cap would be based on disbursements allocable to the  
28 Trustee's tenure. To that end, counsel for the Trustee  
memorialized the understanding for the post-confirmation bank  
account management and administrative payment protocol in an email  
dated November 1, 2013. See Exhibit B to the Declaration of David  
A. Honig, Esq., dated December 12, 2013, at Docket No. 306-2.

Following the confirmation hearing, Ms. Mansouri proposed

1 going to the bank to take control of the disbursements. Mr.  
2 Lapping directed his client to do nothing further until after Mr.  
3 Honig's e-mail arrived and the group could settle on the details.  
4 See Declaration of David A. Honig, Esq., dated March 10, 2014, at  
5 Docket No. 374. Despite this direction and in disregard of the  
6 agreed protocol for disbursements, Ms. Mansouri delivered the plan  
7 confirmation order to Bank of America and directed the bank to  
8 give her immediate control of the account. The bank froze the  
9 account briefly but ultimately turned control of the account and  
10 funds to her. Consequently, the Trustee could not implement the  
11 planned procedure for payment of the administrative expenses.

12 Given this sequence of events, the court does not believe  
13 that the funds were "disbursed by" the trustee as much as they  
14 were "seized by" Ms. Mansouri and the Debtor. Therefore, the  
15 language of section 326(a) prohibiting the trustee from  
16 calculating his maximum fee based on disbursements made or monies  
17 turned over to the debtor does not apply in these particular  
18 circumstances. Effectively, Ms. Mansouri became the Trustee's  
19 agent (albeit without his consent), so Debtor's disbursements to  
20 administrative claimants whose claims were incurred during the  
21 Trustee's tenure were those of the Trustee. To ignore these  
22 facts and apply the statute literally as Debtor and the UST urge  
23 would be patently unfair to the Trustee and reward unacceptable  
24 behavior by the Debtor's CEO. The court will therefore allow the  
25 Trustee to calculate his maximum fee based on distributions made  
26 on administrative claims allocable to his tenure. Consequently,  
27 Trustee's cap calculation should be \$44,262.67, and Debtor should  
28 remit \$21,262.67 (\$44,262.67 minus the \$23,000 already

1 distributed) to Trustee.

2 B. Fees and Expenses of Trustee's Professionals

3 Debtor contends that Trustee and his professionals were not  
4 "responsible for [Debtor's] successful confirmation of a plan" and  
5 did not make "any material contribution to the continued operation  
6 of [Debtor's] existing business during the plan confirmation  
7 process." Debtor's Supplemental Opposition (Docket 332) at 2:11-  
8 16. It thus objects to their fees because their services "were  
9 not reasonably likely to benefit the debtor's estate" and were not  
10 "necessary for the administration of the case." 11 U.S.C. §  
11 330(a). In particular, Debtor objects to consultations by J&C and  
12 Gabrielson with a third party about a possible alternative plan.  
13 The court believes that exploring plan alternatives (and perhaps  
14 rejecting them) was necessary at the time. The most vocal and  
15 active creditor, Bothwell Figg, had not agreed to Debtor's plan  
16 and serious issues existed as to the feasibility of Debtor's plan.  
17 By being receptive to alternative plan arrangements, Trustee  
18 applied further incentive to Debtor and Ms. Mansouri to reach a  
19 consensus with all creditors, including Bothwell Figg. Moreover,  
20 Trustee would have been remiss in performing his duties to the  
21 estate had he not explored the possibility of an alternative plan  
22 offered by a third party. The court therefore rejects Debtor's  
23 contention that the services provided by Trustee's professionals  
24 in this activity were not reasonably necessary at the time they  
25 were performed.

26 That said, the court agrees with Debtor that some of the  
27 services provided by J&C were not necessarily within the scope of  
28 its professional employment but were more properly within the

1 scope of the Trustee's duties. In particular, some of the tasks  
2 performed by counsel and identified in Debtor's opposition appear  
3 non-legal in nature and fall within the scope of duties to be  
4 performed by the trustee. *In re Garcia*, 335 B.R. 717, 725 (9th  
5 Cir. BAP 2005) ("Section 328(b) provides that an attorney or  
6 accountant may not receive compensation for the performance of any  
7 trustee's duties that are generally performed by a trustee without  
8 the assistance of an attorney or accountant."). For that reason,  
9 the court will disallow \$2,000 of J&C's fees. The balance of  
10 J&C's requested fees and expenses described in its First and Final  
11 Application (but not in the supplement, as discussed in footnote  
12 2, *supra*) are allowed.

13 The court's concern about the fees of Gabrielson are directed  
14 at the vague nature of several of its time entries. It repeatedly  
15 billed time for "review[ing] and respond[ing] to financial and  
16 accounting communication involving [X number] e-mails." Without  
17 more information, the court cannot determine whether the review of  
18 such e-mails provided a benefit to the estate. The fees for these  
19 imprecise time entries exceed \$6,600.00. By the court's  
20 calculation, Gabrielson charges \$10 for each e-mail. Without  
21 knowing whether these emails are simply those on which Gabrielson  
22 is copied as a courtesy, or whether they involved matters  
23 requiring Gabrielson's professional expertise, the court cannot  
24 conclude that the services were necessary and beneficial.  
25 Accordingly, the court will reduce Gabrielson's fees by \$3,000,  
26 and overrules the balance of Debtor's objections to Gabrielson's  
27 fees. While Mr. Gabrielson could have appeared at hearings by  
28 telephone (thus reducing his travel time), Trustee may have

1 required his assistance with respect to feasibility or other  
2 financial matters raised at a particular hearing. The court  
3 cautions professionals about unnecessary attendance at court  
4 hearings, but Mr. Gabrielson's attendance was not duplicative of  
5 another professional. In future matters in this court, Mr.  
6 Gabrielson may want to consider appearing telephonically, but the  
7 court will not reduce his compensation for being available to  
8 advise Trustee at hearings in this hotly contested case.

9 C. Conclusion

10 Counsel for the Trustee should prepare orders awarding fees  
11 and expenses in accordance with this memorandum decision. He  
12 should obtain the consent of the UST's and Debtor's counsel as to  
13 the form of the orders. If no such consent is obtained, he should  
14 serve the proposed form of order on the UST's and Debtor's  
15 counsel, upload the proposed form of order, and send an e-mail  
16 (copied to Applicants) to Montali\_Orders@canb.uscourts.gov stating  
17 the nature of the dispute, if any, as to the proposed order.

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19 \*\*\* END OF MEMORANDUM DECISION \*\*\*

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